Addicts Rehabilitation Center Fund, Inc. *and* District Council 37, AFSCME, AFL–CIO. Case 2–CA–31771

February 29, 2000

DECISION AND ORDER

BY CHAIRMAN TRUEDALE AND MEMBERS FOX AND HURTGEN

On July 20, 1999, Administrative Law Judge Howard Edelman issued the attached decision. The General Counsel filed limited exceptions, and the Respondent filed cross-exceptions. The General Counsel also filed an answering brief to the Respondent's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Addicts Rehabilitation Fund, Inc., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(n).

"(n) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act."

2. Substitute the following for paragraph 2(d).

"(d) Within 14 days from the date of this Order, offer the following employees full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed:

James Sturkey	Alexis Ferrel
Geraldine Carthen	Kyra Skinner
Judith Flowers	Trina Grant
Katrina Wright	Beverly Ballard
Steven Gines	Kenneth Jackson
Cynthia Grant	Joseph Lee
Michael Sanders	Beverly Harris
Roberta Thompson	

3. Replace paragraphs 2(e), (f), (g), (h), and (i) with the following.

"(e) Make whole the above-named employees for losses sustained as a result of the unlawful layoffs and constructive discharge.

"(f) Make whole Darlene McPhatter for any losses she sustained as a result of her unlawful transfer.

"(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs of September 2, 1998, the unlawful transfer of Darlene McPhatter, and the unlawful constructive discharge of James Sturkey, and within 3 days thereafter notify each unlawfully laid off or discharged employee that this has been done and that the layoffs and discharge will not be used against them in any way.

"(h) Within 14 days after service by the Region, post at its New York, New York facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

"(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply."

4. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, the Respondent argues that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[2] We shall modify the judge's recommended Order and substitute a new notice with the Board's traditional narrow cease-and-desist paragraph. We will also modify the judge's recommended Order to conform with his remedy.

In adopting the judge's findings that the Respondent violated the Act in several respects, Member Hurtgen does not rely, for purposes of establishing animus, on the first and third paragraphs of the minutes from the Respondent's August 6 "Look N 2" meeting. Further, because he agrees with the judge that the Respondent violated Sec. 8(a)(3) by laying off unit employees, Member Hurtgen finds it unnecessary to pass on the judge's additional finding that the Respondent unlawfully failed to recall laid-off employees Flower and Grant.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT solicit grievances from you as a means of thwarting an organizing campaign.

WE WILL NOT threaten you with unspecific reprisals because of your support for and activities on behalf of the Union or any other labor organization.

WE WILL NOT threaten you with disciplinary action because of your support for and activities on behalf of the Union or any other labor organization.

WE WILL NOT threaten you with transfer to another department because of your support for and activities on behalf of the Union or any other labor organization.

WE WILL NOT threaten you with loss of employment if you attempt to organize for the Union or any other labor organization or select the Union as your collective-bargaining representative.

WE WILL NOT threaten you with loss of pay because you attempt to organize for the Union or any other labor organization.

WE WILL NOT create and maintain an employer dominated labor organization.

WE WILL NOT provide unlawful assistance to an employer dominated labor organization.

WE WILL NOT transfer you to other departments because of your activities in support of the Union or any other labor organization.

WE WILL NOT fail to provide you with your scheduled paychecks because of your activities in support of the Union or any other labor organization.

WE WILL NOT constructively discharge you because of your activities in support of the Union or any other labor organization

WE WILL NOT lay off or otherwise discriminate against any of you for supporting the Union or any other labor organization.

WE WILL NOT fail to recall you because of your support for the Union or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days of the date of the Board's Order, disestablish and cease giving any assistance or support to the Pro-Action Committee.

WE WILL pay you on the September 4, 1998 payroll, with interest to the extent that your payroll checks were late.

WE WILL make you whole for any losses you sustained as a result of the late payroll checks.

WE WILL within 14 days of the date of the Board's Order offer the following employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed:

James Sturkey	Alexis Ferrel
Geraldine Carthen	Kyra Skinner
Judith Flowers	Trina Grant
Katrina Wright	Beverly Ballard
Steven Gines	Kenneth Jackson
Cynthia Grant	Joseph Lee
Michael Sanders	Beverly Harris
Roberta Thompson	

WE WILL make whole the above named employees for losses sustained as a result of the unlawful layoffs and constructive discharge.

WE WILL make whole Darlene McPhatter for any losses she sustained as a result of her unlawful transfer.

WE WILL within 14 days of the Board's Order, remove from our files any reference to the unlawful layoffs of September 2, 1998, the unlawful transfer of Darlene McPhatter and the unlawful constructive discharge of James Sturkey, and WE WILL, within 3 days thereafter, notify each unlawfully laid off or discharged employee that this has been done and that the layoffs and discharge will not be used against them in any way.

ADDICTS REHABILITATION CENTER FUND, INC.

Leah Z. Jaffe, Esq., Vonda Marshall, Esq., for the General Counsel.

Joseph Fleming, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on March 22, 23, 24, 26, April 19, 20, 21, 22, 26, 29, and May 4, 1999, in New York, New York.

A charge was filed by District Council 37, AFSCME, AFL–CIO (the Union), on October 20, 1998,[1] against Addicts Rehabilitation Center Fund, Inc. (Respondent).

On December 22, the Union filed an amended charge. A complaint issued alleging violations of Section 8(a)(1), (2), and (3) of the National Labor Relations Act (the Act).

On the entire record in this case, including my observation of the demeanor of the witnesses and a careful consideration of the briefs filed by counsel for the General Counsel and counsel for Respondent, I make the following findings of fact and conclusions of law.

Respondent is a New York, not-for-profit corporation, engaged in providing residential treatment to drug addicted clients with facilities located at 2015 Madison Avenue and 1881 Park Avenue, New York, New York (Respondent's facilities). An-

[1] All dates refer to the year 1998, unless otherwise noted.

nually, in the course and conduct of the operations described herein, Respondent receives gross revenues in excess of $500,000 and purchases and receives at its facilities in New York, New York, supplies and materials valued in excess of $2000 directly from suppliers located outside the State of New York. I find Respondent meets the direct standard for residential facilities, as well as the statutory requirement that there is at least a de minimus connection to interstate commerce.

Respondent employs approximately 107 employees, excluding department directors and executives. Each department is headed by a "director." The department directors are all admitted supervisors within the meaning of Section 2(11) of the Act. At the top of Respondent's organizational structure are James Allen, the executive director; Reginald Williams, director of operations; and James Bryant, director of finance.

The Union commenced an organizing campaign in May 1998 among employees employed at Respondent's facilities. In furtherance of its organizing activities, the Union held meetings with employees and distributed petitions on which employees designated the Union as their collective-bargaining representative. The credible evidence establishes that by August 6, Respondent's officials, including James Allen, Respondent's executive director, were keenly aware of the organizing efforts. This is established by Allen's testimony, as well as the minutes of the regularly scheduled supervisor's meeting, referred to by Respondent as the "Look N 2" meeting, held on August 6. [2]

Respondents animus toward the Union is established in part by Respondents' "Look N 2" minutes of the supervisor's meeting on August 6 which attributes to Allen numerous expressions of union animus including the following:

> Mr. Allen will revisit Union situation. Employees are trying to start a Union at ARC. Mr. Allen is opposed to this. One of the things it will do is further dilute the quality of performance at ARC. The other thing no one wants to admit is that they are involved in this. Mr. Allen feels that someone who does not think he is not [sic] running ARC like he should. At the "Total Staff Meeting" on Monday, he will ask Mr. Allen to address the issues and let him respond to them.
>
> [In the very next paragraph.]
>
> Mr. Allen states that he does not plan to co-sign for anymore loans until such time as he resolves this. He sees no reason to put his personal possessions at risk for a group of staff members that don't think he is running the agency properly.
>
> This Union situation comes at a bad time. Mr. Allen states we that we are not meeting our work scope.

Allen's animus toward the Union was also expressed in a written transcription of a tape recording of a meeting held with Respondent's employees on August 10 where he said:

> This is on unions these organizations have no respect for ARC or its existence. They don't even refer people to us. One of the heads tried to discourage and disqualify a member of its klan who had come to ARC for treatment. . . . None of these so called unions respect us for what we've done for their members and now that we've become semi legit, valid organization they're [sic] trying to come in and parasite upon us. This is for my Total Staff Meeting [sic].
>
> The nerve of unions attempting to sneak into ARC through the back door. We've been treatment [sic] police officers, parole officers . . . and none of these unions have contributed one dime, not even through their funds that they have to provide treatment for their [sic] members to ensure the longevity of its existence. And now they have the nerve to try and sneak into ARC through the back door. They don't even respect us. But they want our money.

Judith Flowers, was a secretary working for Respondent in early August and an active union supporter. On or about August 5, 1999, Flowers was prevented by Allen from entering his office, a place to which she customarily had access. When Flowers asked Allen why she had suddenly been barred from his office, he responded that he had heard that she was one of the three union spearheads trying to organize Respondent. Flowers was one of the three leading union organizers. Flowers said that she did not know what a spearhead was and Allen explained that it was an organizer. Flowers denied that she was a spearhead, but Allen, apparently unconvinced, warned her that she had better be careful.

Darlene McPhatter was Reginald Williams', Respondent's operations manager, secretary, and an active union advocate. McPhatter credibly testified that on August 3 or 4, Williams approached her while she was working in the office they shared. Williams asked McPhatter to confirm rumors that he had heard that she was trying to recruit people for the Union. McPhatter denied the rumors. Williams approached her again the next day and asked her if she was not part of the organizing campaign, because unidentified witnesses had reported that McPhatter, Judith Flowers, and Pamela Fleming, another employee of Respondent on the union organizing committee, had asked them to sign a petition. Again McPhatter denied knowing anything about it.

On August 10, Williams again confronted McPhatter with the rumor that she was a union organizer. McPhatter denied she was an organizer, but admitted that she was a strong union supporter. Williams told McPhatter she should not have lied the last time they had spoken and McPhatter responded that what she did on her own time was her own personal business and she did not have to discuss with him what she did on her own time. Later that same day, Williams resumed the conversation. He told her that she made him look bad by lying to him about her union involvement and expressed disappointment at her duplicity. McPhatter apologized for making Williams look bad, but pointed out that she had never asked him to vouch for her. McPhatter promised that in the future if Williams asked her something she did not want to answer she would say she did not know.

During another conversation between McPhatter and Williams, on or about August 12 or 13, Williams told McPhatter that Robin Payne, an employee had had an altercation with her supervisor, Melissa Davis. McPhatter observed that Davis was messing with Payne because of Payne's involvement in the Union, to which Williams replied that he did not believe the Union would be successful, just a lot of people would lose their jobs.

On or about August 13, Williams entered the office he and McPhatter shared. He instructed her to write a warning to her-

[2] As set forth below, I find Allen, Williams, and Bryant are not credible witnesses. I credit their testimony only when such testimony constitutes an admission against Respondent's interest. I find the General Counsel's witnesses are credible witnesses. My findings of fact are based on the credible testimony as the General Counsel's witnesses, admissions by Respondent's witnesses, and documentary evidence.

self for lying. McPhatter asked what for, and Williams responded, "[F]or lying." McPhatter asked, "[L]ying about what?" and Williams said "[F]or your part in the Union." McPhatter refused and said what she did with the Union was her own business. She asked if Williams would write himself up for lying to her and he said no. Williams repeated the demand that McPhatter write herself up two or three more times. Finally, McPhatter told Williams that if he felt so strongly about it, he should write the warning and she would express her disagreement. Williams insisted that she draft the writeup. Then Williams said, "[T]he next time you lie to me I am going to transfer you." McPhatter responded that she believed Williams conduct was illegal, to which Williams responded, "[Y]ou're transferred, get out." McPhatter asked why she was transferred and Williams said, "[F]or lying." Then McPhatter asked to which department she would be transferred and Williams replied, "[H]e did not know." McPhatter asked if her pay would change and Williams responded she would have to wait for Allen. McPhatter had been paying one of Williams' personal bills when he interrupted her work and she handed the bill back to him saying, "[I]f I'm transferred pay your own bills." Williams told her to "get out" and McPhatter said she would leave when she had gathered her stuff. While McPhatter gathered her things and placed a phone call to her mother, Williams yelled at her to leave his office. At one point, the phone rang and McPhatter reflexively started to answer and then put the call on hold and told Williams, "If I am transferred you can answer your own call."

On August 10, Respondent held a regularly scheduled meeting attended by all employees. A significant portion of the meeting was taped. The tape revealed, in both its tone and content an angry diatribe by Allen about the Union, but no discussion of either the work scope or any alleged fiscal crisis, Allen testified that he did not discuss the Union at this meeting, but rather that the sole topic of the meeting was the economic crises. In fact, just the reverse was true. Contrary to his testimony, Allen accused the staff of "sneaking in secret and plotting to bring the Union in." He stated that cashflow was a longstanding problem for Respondent, but that he had protected the staff from cash-flow problems by borrowing to cover payroll at great personal risk, a practice which he would not continue for people who "would rather go and get a union." Allen chastised the staff for lying to Williams when he questioned them about their union activities. He informed his employees that if the Union came in, 60 percent of them would not be qualified to work for Respondent. He impressed on employees how good he had been to them and noted that most of them were fired from other jobs. Allen emphasized again that most employees were not qualified for their positions and asked them if they knew that the Union would give Respondent the right to hire qualified employees.[3]

The tape recording reveals that Operations Manager Reginald Williams also spoke at the August 10 meeting. He admitted at the meeting to questioning employees about what they heard about the Union although he said he did not ask for names. He noted there were people without qualifications earning $30,000 or $40,000 annually. He suggested that employees who were not happy working for Respondent leave.

When Allen took the floor again, he stated that Office of Alcoholism and Substance Abuse Services (OASAS), the New York State agency which funds and regulates Respondent, was putting pressure on him to hire qualified people and the only reason people were working was because of his stubborn resistance the Sate's effort in this regard. After emphasizing the vulnerability of the staff because of their lack of qualifications again, Allen said he would listen to their problems. However, before opening the floor to the staff, he noted that if the State and/or city did not provide funding there would be no money for payroll.

Several employees took the floor at Allen's invitation, including Flowers and McPhatter, both of who defended the union organizing campaign and identified themselves as union supporters. Another employee, named Benjamin Dudley spoke. He complained about being unable to keep track of sick and vacation days and about being charged for lost and broken equipment as well as the dearth of educational opportunities.

The tape at this point, ended part way through the August 10 meeting. However, the credible testimony of McPhatter, Flowers, and other witnesses called by the General Counsel, established that after numerous employees voiced their complaints, Allen introduced the idea of forming a staff committee to deal with employee grievances and announced that he would give the staff a free day to form such a committee, which was to be called the "Pro-Action Committee," at which point the "Total Staff Meeting" was adjourned.

Trina Grant, an administrative assistant, who was part of the mass discharge credibly testified that after the "Total Staff Meeting" she returned to her department, where she met with Melissa Davis the head of inventory department where Grant worked. Davis is a supervisor within the meaning of the Act. Another employee, Cynthia Grant, Trina Grant's sister-in-law was also present. Cynthia Grant stated that she was not going to have anything to do with the Union and she did not feel that the employees needed a union. Cynthia went on to praise Allen. Cynthia asked Trina if she had put her name on the union list and Trina admitted she had. Melissa Davis stated, "[W]ell, anybody who put their name on the list they ain't going to be here long, they're going to wind up terminated." Although Davis is a current supervisor for Respondent she was not called to rebut this testimony.

Following McPhatter's argument with Williams, concerning her refusal to share her union activities with him, and his threat to transfer her, described above, McPhatter was suspended with pay for a few days. On August 17, at a meeting attended by McPhatter, Williams, and Allen, Linda Landon, the director of personnel, and Cheryl Marius, the director of resources, among others, Allen asked Williams if he could work with McPhatter. Williams responded that he could not because he could not trust her. Then Allen asked McPhatter if she could work with Williams, to which she responded that she could work with anyone. Allen then announced that McPhatter would be transferred from Williams' department to Marius' with a commensurate cut in pay. When McPhatter protested that her pay should not be cut because she had done nothing wrong, Allen explained that Williams' secretary was on a higher budget line than Marius' secretary.

[3] Allen testified contrary to the tape, that the meeting centered on work scope and the fiscal crisis. Allen testified he could not recall whether the Union was discussed. His testimony as described in major detail below was totally discredited by the actual tape. Given nothing else, such contradiction between the tape recording and his testimony on such significant issues would be enough to discredit his entire testimony.

After the meeting, McPhatter complained to the Union about the cut in pay. The Union, by letter, protested Respondent's action and threatened to file unfair labor practice charges. Eventually, Respondent's board of directors ordered Allen to restore McPhatter's pay to the level she was earning as Williams' secretary, although McPhatter continued in her new role as Marius' secretary.

Immediately after the August 10 "Total Staff Meeting," a group of about a 12 employees met with their supervisors' permission at 1881 Park Avenue for the purpose of forming the Pro-Action committee. The employees decided to elect a representative from each department to sit on the committee. McPhatter was elected chair and Flowers was elected cochair. Pamela Fleming was elected secretary.

It appears that after the initial Pro-Action Committee's initial meeting on August 10, the idea was dormant for awhile. McPhatter attempted to inspire interest in the committee, but was unsuccessful in getting it off the ground. However, in or about the second week in September, the idea was revived, apparently on Respondent's initiative. Kelly Germany, an employee credibly testified that about a month after the August 10, "Total Staff Meeting," the health and safety department had a regular departmental meeting presided over by Gary Carswell the director of internal affairs, and a supervisor within the meaning of the Act. At the beginning of the meeting, Carswell discussed routine matters such as clients, equipment, and problems in the department. Later in the meeting, however, Carswell raised the issue of the Pro-Action Committee. He said that the department had to vote for its delegate. By this time, three departments, medical, health and safety, and housekeeping had been merged into one and accordingly, Carswell said the newly constituted department was entitled to three representatives on the Pro-Action Committee. The employees voted by paper ballots that were folded up and placed into a hat. Carswell was present during the entire process. An employee counted the ballots, but since two employees were not in attendance at the meeting, Carswell instructed her to wait to make the tally final until those employees had had an opportunity to vote. Later that day, the two employees came to the office to pick up their paychecks and they were instructed to go to the Carswell's office to vote, which they did. The following Monday, Carswell announced the results of the election. Kelly Germany, Ralph Chappelle, and Monique Montgomery had been selected to represent the department.

Germany, also credibly testified about several later meetings of the Pro-Action Committee. At an early meeting the committee agreed not to elect a chair or cochair. Sometime in October, the Pro-Action Committee met with Allen to discuss a complaint from an employee named Cheryl Carrington that Williams had treated her with disrespect in front of clients and other staff members. At this meeting, the committee informed Allen of their decision not to elect a chair or other officer. Allen disagreed with the democratic premise of the decision. He stated that in every organization someone has to be in charge. Allen went on about this point at some length, during which no member of the committee spoke. As a result of Allen's position on this point, the Pro-Action Committee elected a chair and cochair at their next meeting. Germany was elected Chair.

Germany met a few times with Allen as the representative of the Pro-Action Committee. At some point around November she began to meet with Gary Carswell instead. At first there were regular weekly meetings with Carswell and the Pro-Action Committee because of steady stream of employee grievances. Later, the meetings tapered off as the number of grievances declined.

Allen testified that the purpose of the Pro-Action Committee was to have a body that would bring employee complaints to the attention of management. He admitted that if the committee did not meet certain standards and was in his opinion "a kangaroo court" he would not recognize it. According to Allen, his policy was to receive grievances presented by the Pro-Action Committee and implement those suggestions by the committee he agreed with. Complaints and suggestions by the committee that he decides have no merit, he rejects.

On August 27, Allen called an emergency "Total Staff Meeting." Allen spoke first. He announced that due to budget deficits and other pressing financial concerns, there would be an immediate staff reduction. Allen also announced at this meeting that due to short falls in funding he would be unable to meet the September 4 payroll. Allen attributed the cash-flow problem to OASAS' failure to come forward with funding in a timely manner. He appealed to the employees to continue to work without pay, although he could not promise them when their paychecks would be forthcoming. Allen stated that he could not borrow money to cover the payroll at this juncture because he had no cashflow and he could not borrow without cashflow. He also said he would not borrow until he was advised in writing by the bank and his attorney that he would not be personally at risk on any loans Respondent took. At this meeting, Allen blamed Respondent's financial troubles on the "State," which he accused of being consistently late with funding.

Respondent did miss the September 4 payroll, as Allen predicted at the August 27 "Total Staff Meeting." James Sturkey an employee testified, that on or about September 4, he failed to receive his bimonthly paycheck. He called the payroll department and inquired whether they would receive paychecks that week and when paychecks would be issued. The individual with whom he spoke at the payroll department (Sturkey did not recall who it was) informed him that there would likely be no paychecks and they could not tell him when payroll would be resumed. Later that day, Sturkey turned in his resignation because as he credibly testified he could not pay his child support without a steady paycheck. According to Sturkey, he would not have resigned but for the missed payroll. Later, Sturkey collected all of the money owed to him by Respondent.

Respondent reinstated its payroll for staff members in the next pay period. The staff members were also reimbursed for the missed payroll at that time. Supervisors and executives waited an additional 2 weeks to receive their pay, according the Respondent.

On or about September 2, the Respondent laid off the following 14 employees, each of whom received a standard letter informing them that the layoffs were necessitated by Respondent's economic difficulties:

Geraldine Carthens	Alexis Ferrel
Judith Flowers	Kyra Skinner
Katrina Wright	Trina Grant
Steven Gines	Beverly Ballard
Cynthia Grant	Kenneth Jackson
Michael Sanders	Joseph Lee
Roberta Thompson	Beverly Harris

In late August, Allen, Bryant, and Williams decided that layoffs were their only possible course of action, after OASAS informed Bryant that the budget would be unacceptable without significant cuts. Bryant determined that in order to submit an acceptable budget, the cuts would have to total about $700,000, but it is not clear how he arrived at this figure. Allen and Williams made the decision as to which employees would be let go. According to Allen and Williams, the decision was made by leaving vacant positions unfilled, where possible, eliminating nonessential positions and laying off employees in seniority order. However, records concerning seniority were not produced by Respondent. Williams testified that at various times different directors were called into provide input on the layoffs. However, no directors were called as witnesses by Respondent's to testify about the process.

William's testimony as to how the decision was made to lay particular people off was sketchy and confusing. He testified that it was done based on needs of the facility. For example, they would let a cook go if they had too many cooks, regardless of seniority compared to noncooks. However, Williams admitted that unlike cooks, the skills of clerk typists, such as Judith Flowers were interchangeable across departments. He did not explain whether Flowers was compared only to employees in her department or to all clerk typists, or the reason for the method employed. When questioned on this issue during cross-examination, Williams was vague. It appears that Williams' testimony was that cuts were made on a departmental basis regardless of whether the skills of the individual were interchangeable across departments. He did not explain why it was done this way. Nor did Respondent produce a single document, which reflect how the layoff decisions were made.

Williams also testified that at about the same time as the layoffs some departments were merged. However, it is clear that the mergers were largely cosmetic and the only cost savings realized from the mergers were the six vacancies that had existed before the layoffs as well as the layoffs.

Respondent's defense to the 8(a)(3) allegations is that both the missed payroll and the layoffs in September were caused solely by an economic emergency, and that the union organizing campaign did not play any role in these decisions. In support of its economic defense Respondent cites both a looming deficit and intractable cash-flow problems. Respondent's primary funding source is the Office of Alcoholism and Subsistence Abuse Services (OASAS), which is both a funding source and a licensing and regulatory agency of the State of New York. OASAS receives Federal block grants that are then allocated by the New York State legislature. Respondent has been receiving funding from OASAS for approximately 20–25 years. In the fiscal year 1997–1998, Respondent received state aid funding in the amount of $4,026,977, an amount slightly higher than they had received in the previous fiscal year. In 1997–1998 Respondent also expected to receive funds from other sources in the amount of $2,369,414. For the 1998–1999 fiscal year Respondent expected to receive $4,043,584 in state aid. Respondent's overall budget for the same year is about $7 million. Most of the remainder of the funding is generated from the Office of Treatment Monitoring, of New York (OTM), a New York City agency which reimburses Respondent for services to clients who are on welfare. Respondent also receives about $100,000 per year directly from clients who can afford to pay and about $25,000 from the Human Resources Administration of New York City, in the form of food stamps. Respondent does not receive funds from private insurance companies or from Medicaid.

Between 1993 and 1998 Respondent was the beneficiary of a grant from the United States Department of Housing and Urban Development (HUD), for $300,000 per year. This grant expired on April 30, 1998. An extension of the grant was applied for by Respondent and denied in January 1998. At the expiration of the HUD grant, Respondent laid off six employees who were paid directly by that grant. The grant also covered some supplies and equipment, most of which were discontinued when the grant expired. However, the cost of one large copy machine, which cost the Employer approximately $1210 per month was shifted from the HUD grant to general revenues. At the time ARC received the HUD grant in 1993, OASAS reduced Respondent's allotment by $163,000 per year. These funds have not been restored since the expiration of the HUD grant.

Respondent's revenue from OASAS is delivered in four advances over the course of the fiscal year that commences on July 1. The first installment is generally delivered roughly, in mid-July after the Respondent's contract with OASAS is fully executed. Another advance is received sometime toward the end of September and another near the end of December. The final installment is delivered in late March. Respondent received its regularly scheduled advances in April and July 1998 of $891,639 and $838,430 respectively. In September another advance was received in the neighborhood of $800,000. These were the amounts ARC anticipated receiving at the time they anticipated receipt of the funds.

Respondent cites as a factor in its fiscal crisis a change in bookkeeping practices by OASAS. At the beginning of every fiscal year OASAS provides its client agencies with a contract attached to which is a document referred to "appendix B" which is the budget of record, based on prior years' experience. The information on appendix B is then changed as needed based upon information provided by the client agency in a document called the "Consolidated Budget Report" (CBR). In addition, programs can at any time submit another document called the "Program Budge Change Request" (PCBR), which can be used to change a line item distribution or information about revenue sources.

According to Respondent, prior to the 1997–1998 fiscal year, it was able to submit a budget based upon estimated savings. OASAS requires Respondent to submit a line item budge on the CBR with a bottom line that matches the information on the appendix B. For example, the detailed line item expenses on the CBR for personnel must total the gross amount allocated for personnel on the appendix B. Prior to the introduction of the CBR in 1997–1998 fiscal year, Respondent could estimate savings in its expenses and subtract the estimated savings from the total in order to match the gross amount on the appendix B. In this way it could make its budget submission match the budget of record on paper, if not in fact. In the 1997–1998 fiscal year, according to Respondent, OASAS changed its procedures in a manner that precluded its client agencies, from taking projected savings into account when they submitted their budgets. Therefore if the appendix B allocated to the personnel budget a particular amount, Respondent, unlike in earlier years, was constrained to submit a budget (CBR) which reflected that amount, without regard to estimated savings because the CBR form simply did not have a space in which to account for estimated savings. In September 1998, when Respondent submit-

ted the 1997–1998 budget, months late, its personnel expenses were significantly higher than that which was reflected on the appendix B.

James Bryant, Respondent's fiscal director, however, admitted on the stand that the change effected by OASAS was merely a change in reporting and accounting technique, it did not alter the bottom line of how much money Respondent had to work with at all. Further, Lisa Lite-Rottman, field service coordinator for OASAS who has responsibility for Respondent's contract with OASAS, testified that under the new system, Respondent could still account for estimated savings by submitting a PBCR. Lite-Rottman was a neutral witness. She was extremely knowledgeable and articulate. I find her credibility to be unimpeachable.

Respondent explains the timing of the layoffs and missed payroll by contending that September was a critical date, on which OASAS had required it to submit the 1997–1998 budget (CBR). However, the layoffs effected in September 1998, would have had no impact on the 1997–1998 budget, since they were only effective in the 1998–1999 fiscal year which had begun on July 1. Further, Respondent's contention that failure to submit its budget by September 4 would result in the interruption of its funding is contradicted by Lite-Rottman's credible testimony that advances were provided regardless of whether the CBR's were timely filed, and evidence that Respondent's budgets were late before and after September 1998, without any interruption in funding. In fact, the 1997–1998 budget, the very budget Respondent was ostensibly anxious to submit by September 4, was due in February, but not submitted in an acceptable form until November. In general, Lite-Rottman testified that Respondent was habitually late and or deficient in its submissions to OASAS. Nor was this habitual delinquency confined to the submission of budgets. Lite-Rottman credibly testified that although Respondent was required to notify OASAS of the layoffs it did not do so until months later after the information had been requested several times. Further, Lite-Rottman testified that, notwithstanding OASAS' responsibility as a fiscal monitor, neither she nor her staff were informed of Respondent's pending fiscal crisis until Aura Almanzar, the program manager who has direct responsibility for Respondent and reports to Lite-Rottman, attended the August 27 "Total Staff Meeting," at the request of a group of employees. The failure of Respondent to inform OASAS of its pending fiscal crisis is particularly glaring in light of the fact that it had, had several meetings with Almanzar in the months prior to August 27 during which she provided them with technical assistance on budgetary matters. Almanzar, also a neutral witness, further credibly testified that had she been advised of the crisis sooner she may have been able to take some steps to alleviate, if not eliminate the problem. Although Respondent makes much of the fact that additional funds were not available to it in the summer of 1998, there is no evidence that Respondent asked for additional funds, with the exception of replacement for funds lost when the HUD grant was not awarded.

Bryant testified that in the summer of 1998, OASAS owed it significant sums of money from prior years and he presented these unpaid sums as a factor in Respondent's fiscal crisis. However, Bryant admitted that much of this money had been owed since the 1995–1996 fiscal year. Further, Bryant conceded that by the summer of 1998, OASAS had reduced, not increased the amount of money owed from more than $800,000 in March 1998 to $300,000 on September 4, 1998.

Respondent's position that the layoffs were triggered by its understanding that its funding would be immediately interrupted unless it could reconcile its budget deficit by September 4 was not supported with a single document from OASAS threatening to discontinue such funding, although Respondent and OASAS corresponded extensively in the summer of 1998. Lite-Rottman testified that any imposition of sanctions including cutting off funding would have been proceeding by a warning. To her recollection no such letter was sent.

Respondent has also attributed a large portion of its fiscal difficulties to untimely and inadequate reimbursements by OTM. Aside from self-serving statements by Respondent's witness, the record in this case is devoid of probative factual material, that there was a sharp decline in funding in the summer of 1998. To the contrary, the record reflects that to the extent there has been a decline in funding by OTM, it has been a persistent problem since as early as 1997. Further, the record reflects that Respondent hardly considered the decline in OTM funds a crisis. Respondent failed to take advantage of the appeals process that is available to them when OTM declines to make payments on a particular claim. Nor did Respondent produce a single piece of correspondence in which it advised OTM of its crisis and asked for expedited processing of its claims or otherwise convey a sense of urgency.

While Bryant attributed the layoffs to the budget deficit, he attributed the missed payroll to a short-term cash-flow problem, which was related to overall fiscal crisis. However, Bryant testified that Respondent had had intermittent cash-flow problems at least since the decline in OTM reimbursements had started in early 1997. Further, the record reflects that Allen had routinely borrowed against a $650,000 line of credit to cover payroll and abruptly discontinued this practice in the summer of 1998. According to Respondent's witnesses, Allen refrained from borrowing money to cover the payroll in this period because he was concerned about being held personally liable for any loans taken out on Respondent's behalf. The concern for his personal finances, Allen testified, dawned on him suddenly one morning while he was meditating. The event which Allen claims triggered the concern for personal liability involved a director of a similar program who had lost his home after assuming liability for program loans, in the 1960s or 1970s. Allen also attributed his fears concerning personal liability to his impression that the State would stop funding Respondent and leave him personally responsible for its unpaid debts.

In late July, Allen, according to his testimony, asked Bryant to find out from the bank whether Allen's personal assets were at risk when ARC borrowed against its line of credit. In late July or early August, Respondent's lawyer, Joseph Fleming, advised Allen and Bryant, that in order to avoid personal liability, Allen should sign for the funds borrowed against the line of credit in the corporation's name, by "James Allen, Executive Director." The total period for which Respondent stopped borrowing to cover payroll was between July 24, up until September 15, which almost precisely coincides with the Union's organizing campaign. The record reflects that between these dates, the entire $650,000 line of credit was available to borrow against, which would have been ample to cover the September 4 payroll of approximately $180,000.

The record does not reflect significant changes in Respondent's fiscal condition in the summer of 1998 that were likely to have triggered a mass layoff or a missed pay period. Lite-Rottman, who has intimate knowledge of Respondent's fi-

nances, testified that she was unaware of any change in conditions in the summer of 1998, which would have necessitated the layoff of 14 people. Nor was she aware of any change in Respondent's fiscal condition that would have necessitated missing the September 4 payroll. In fact, instead of applauding Respondent's fiscal responsibility in affecting the layoffs, Lite-Rottman expressed concern as to the affect of the layoffs on the program. She requested that Respondent submit figures reflecting three scenarios, the size of the deficit without any layoffs, the size of the deficit with layoffs affecting only direct care personnel and the size of the deficit reflecting all of the layoffs implemented. Respondent's response to Lite-Rottman reflected that even with the layoffs there remained a deficit of $648,987. The record does not reflect how Respondent intended to close the remainder of the deficit.

As set forth above I do not find Allen to be a credible witness. His testimony, the "Look N 2" minutes of Respondent meetings and a tape recording of the August 10 meeting conclusively established Allen to be a liar, without any regard to the oath he took at this trial, notwithstanding his proclaimed "because I trust God."

In response to the General Counsel's examination of Allen pursuant to Rule 6(11)(c) of the Federal Rules of Evidence, Allen was frequently rambling, if not incoherent, unresponsive and evasive. Even on the simplest most uncontroversial points, Allen steadfastly resisted answering a direct question with a direct answer. For example, when counsel for the General Counsel asked Allen whether he trusts his supervisory staff, he responded, "You ask me a question I cannot answer directly yes or no, because I trust God and that he will make the people that work with me do his will." Sometimes Allen just ignored the question and provided a completely unresponsive answer. For example, when Allen was asked what the following sentence in the August 6 Look N 2 minutes meant, "[T]he other thing no one wants to admit they are involved in this." Instead of offering an explanation of those words, Allen responded, "I was hoping he would finish so we could get back to our fiscal matters." Allen was particularly evasive when questioned about matters central to the case, such as his views on his employees organizing efforts. One example of this tendency is the following exchange:

> Q. (By General Counsel): Do you recall telling employees at any total staff meeting that you were displeased with their interest in the Union?
>
> A. I don't recall having said that.
>
> Q. Is that the way you felt about it at the August 10, Total Staff Meeting?
>
> [Pause]
>
> JUDGE: Is that how you felt about it?
>
> A. I am trying to reflect on that your honor.
>
> . . . .
>
> A. I may have felt that way that I was displeased with the quality of their work.
>
> Q. But that's not an answer to my question, Mr. Allen. Did you tell them or did you feel displeased with employees—on August 10 because they were expressing an interest in joining a union?
>
> A. I cannot answer that absolute because August 10 is a long way off for me. It's not that I am absent-minded or anything but—
>
> Q. Is it your testimony that you don't remember whether or not you were pleased or displeased with employees—with how your employees were expressing an interest in the Union?
>
> A. I may have been unhappy that they were not focusing on their performance.
>
> Q. Isn't it true that you were, in fact, unhappy with your employees for expressing an interest in the Union?
>
> A. I don't know whether its true or not, but I may have felt like that looking back in retrosepct.

Allen's testimony is also replete with areas as to which he had no recollection, which one would expect him to remember. As set forth above, he claimed not to recall having raised the issue of the Union at the August 10, "Total Staff Meeting," which I find impossible to believe given the fact that the tape recording conclusively established that the first 20 minutes of the meeting constituted a diatribe against the Union. Further, it is clear in the August 6, "Look N 2" minutes that Allen planned in advance to discuss the Union at the next "Total Staff Meeting." In this regard, Allen claimed the minutes were not accurate. Allen speculated that the secretaries taking the minutes had inserted their own views. I find such testimony a feble attempt to cover up his lying.

Much of Allen's testimony was on its face implausible if not absurd. His repeated assertions, set forth above, that secretaries inserted their own views into the "Look N 2" minutes instead of accurately representing the participants comments, is one example of testimony that strains credulity. His assertion that it suddenly dawned on him that he might be personally liable on loans based on another program manager's lost home 20 or 30 years before is also patently absurd.

Substantial portions of Allen's testimony were also flatly contradicted by other incontrovertible evidence. For example, his insistence that secretaries inserted their views into the "Look N 2' minutes was a lame attempt to cover up the fact that he had been caught in a lie. He testified that he did not discuss the Union at the August 6, meeting, that he kept trying to steer the discussion back to the fiscal crisis. In fact, just the opposite took place. The "Look N 2" minutes reflect no discussion of the fiscal crisis, but attribute numerous remarks about the Union to Allen.

The most glaring example of Respondent's testimony being contradicted by the record is the audio tape of the August 10 meeting. Allen identified his own voice on the tape and admitted it was an accurate reflection of the portion of the meeting that had been recorded. His own voice flatly contradicted large portions of his prior testimony. The tape belied Allen's testimony that he had no hard feelings against his employees for joining a union, that the decision to stop borrowing to cover payroll was completely unrelated to the organizing campaign, and that it suddenly dawned on Allen that he might be held liable for Respondent's loans. With respect to the last point, the tape made it clear that Allen "had always known" that he might be held liable, but was willing to overlook the risk until his employees began organizing a union.

In contrast to Allen, neither Williams nor Bryant's testimony is replete with brazen lies, but neither of them was forthright. As set forth above, in detail, when questioned closely on cross-examination on significant matters such as whom to layoff, Williams evaded, obfuscated and made speeches instead of answering simple direct questions with simple direct answers. His testimony concerning Darlene McPhatter's position at the meeting at which the decision was made to transfer her to another department, was, as set forth above, misleading. Instead

of forthrightly admitting that McPhatter opposed the transfer, particularly if it meant a cut in pay he continued to insist that she consented to the transfer, even after being confronted with his affidavit to the contrary.

Further, Williams' testimony was unsupported by documents, when documentation clearly should have been produced. He testified that he had notes of telephone conversations with Josephine Armstrong of OTM, conversations about which he testified, but he did not produce those notes although they were subject to the General Counsel's subpoena.

In addition, Williams was misleading on critical issues such as animus. He testified that he did not oppose the Unions although he had personal concerns that a union would affect productivity. This however, is at odds with his statement on the tape, in which he invited employees who would join a union to leave Respondent's employ. He testified that he never heard Allen say that he viewed the organizing campaign as a betrayal, although Allen's views on this were quite clear in the tape of the August 10 at which Williams was in attendance. Similarly Williams testified that Allen did not link his refusal to borrow to employees union activity, notwithstanding Allen's clear casual linkage between the two things on August 10. Williams also testified that prior to the August 10 "Total Staff Meeting," he did not know Allen would raise the issue of the Union. This is almost inconceivable, since both the tape the "Total Staff Meeting" and the August 6 "Look N 2 Minutes" reveal that this subject was uppermost in Allen's mind and Williams was his closest Lieutenant. Further, the August 6 minutes make it clear that Allen announced his intention to discuss the Union at the "Total Staff Meeting" to the entire supervisory staff.

With respect to Bryant, I felt his testimony was colored by Respondent's litigation imperatives. Much of his testimony regarding the fiscal crisis was simply contradicted by Lite-Rottman and Almanzar, both neutral and 100-percent credible witnesses. For example, as set forth above, Bryant's testimony that the inability to account for estimated costs on the CBR created a crisis was simply not true. Estimated costs could be accounted by simply filling out another form. Nor does their testimony support Bryant's contention that September 4 represented a critical date.

In his discussion of legal expenses Bryant was evasive. He admitted that on the CBR, Respondent was only budgeted for $20,000 for legal and audit expenses with $6000 needed for auditing costs. However, he claimed not to have any idea how much the Board litigation would cost Respondent. Nor did he know the cost of trying the case as opposed to settling it. Such contention is inherently implausible coming from the chief fiscal officer for an organization in financial crisis.

He testified that he was not under the impression that Allen was unhappy about the Union, which is not believable since Allen's expressions of unhappiness about the Union at the August 10 meeting, at which Bryant was in attendance, were quite unmistakable. Bryant also continued to deny that Allen linked the refusal to borrow to the organizing campaign, even though this point was crystal clear on the tape recording.

In contrast I found Flowers and McPhatter to be both very credible witnesses. I was impressed with their demeanor. Their testimony was forthright. Flowers testified in great detail concerning her conversations with Allen. Such testimony had a ring of truth to it, not easily made up. The same is true with respect to McPhatter's conversations with Williams. Moreover, their testimony is consistent with the documented intense union animus of Respondent as reflected in the tape of the August 10 meeting, and the "Look N 2" minutes.

As set forth above I conclude that Lite-Rottman and Almunzar, both New York State employees and neutral witnesses were 100-percent creditable.

I also conclude the testimony of the General Counsel's remaining witnesses were credible. Much of their testimony was unrebutted, and all was consistent with Respondent's documented animus as set forth and described above.

Analysis and Conclusions

The 8(a)(1) Violations

I conclude Allen's statement to Flowers, "to be careful," coupled with his accusation to her of "being a union spearhead" constitute a threat of reprisal, and a violation of Section 8(a)(1). See *Leather Center, Inc.,* 308 NLRB 16 (1992).

I conclude Williams persistent questioning of McPhatter one of the Union's primary organizers constituted coercive interrogation, in violation of Section 8(a)(1). In this regard Williams was one of Respondent's highest ranking officials, and McPhatter's direct supervisor. Moreover, such interrogations were made in conjunction with his threats to McPhatter concerning her union activities set forth below. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985); *Litton Systems Cooking Products,* 300 NLRB 324, 324–325 (1990), enfd. 949 F.2d 249 (8th Cir. 1991). Moreover, McPhatter was uncomfortable with the questioning, and evaded answering several questions.

I conclude that Williams' statement to McPhatter that he would transfer her for lying about her union activities and his further statement that he would write her up constitute threats of reprisal in violation of Section 8(a)(1). *Louisiana Council No. 17*, 250 NLRB 880 (1980).

I conclude Allen's solicitation of employee grievances during the August 10 meeting was violative of Section 8(a)(1). In this regard Allen clearly indicated the employees didn't need the Union because he would resolve their grievances *Windsor Industries,* 265 NLRB 1009 (1982), enfd. in pertinent part 730 F.2d 860 (3d Cir. 1981). Moreover, Allen's solicitation of such grievances occurred during the same meeting which was primarily a venonous demunciation of the Union.

I also conclude that Allen's statement during his August 10 tirade against the Union that success of the Union's organizing campaign would mean the loss of employment for uncredentialed employees was a threat to discharge employees because of their union activities, in violation of Section 8(a)(1). *Harper Collins San Francisco*, 317 NLRB 168 (1995), modified on other grounds 79 F.3d 1324 (2d Cir. 1996). I also conclude that Allen's statements during the August 10 meeting, that he would cease borrowing money in order to provide employees with paychecks was a clear threat by reprisal because of their union activities. In this regard, Allen had always borrowed money for paychecks in prior years.

I also conclude that Williams statement to McPhatter that the Union would not get in, but rather, just a lot of employees would lose their jobs was a threat of discharge, in violation of Section 8(a)(1). *Bestway Trucking*, 310 NLRB 651, 671 (1993), enfd. 22 F.3d 177 (7th Cir. 1994).

The evidence conclusively establishes that Respondent created and supported an employer-dominated labor organization, the Pro-Action Committee, in violation of Section 8(a)(2) of the Act. In *Electromation, Inc.*, 309 NLRB 990 (1992), affd. 35 F.3d 1148 (7th Cir. 1994), the Board reexamined and articu-

lated the test for finding that an employer violated Section 8(a)(2) of the Act by dominating and supporting a labor organization. Specifically, the Board articulated a two-pronged test pursuant to which the General Counsel must demonstrate that the organization is a labor organization within the meaning of Section 2(5) of the Act and the formation and/or the administration of the organization is employer dominated. Id. at 994–998. Accord, *EFCO Corp*., 327 NLRB 372 (1998); *E. I. du Pont & Co.*, 311 NLRB 893 (1993). In finding unlawful domination in violation of Section 8(a)(2) of the Act, it is not necessary to establish union animus or other unlawful motive. *Electromation,* supra at fn. 24.

In determining whether the organization is a labor organization within the meaning of Section 2(5) of the Act the Board looks at the following factors: (1) Whether employees participate in the organization; (2) Whether the organization exists at least in part for the purpose of "dealing with the employer"; and (3) Whether these dealings concern terms and conditions of employment. *E. I. du Pont*, supra at 894. In addition there may also be a requirement that the employees in the committee act in representational capacity. See Id. at fn. 7.

In the instant matter, Respondent admits in its answer that the Pro-Action Committee is a labor organization within the meaning of Section 2(5) of the Act. Respondent has further admitted that the Pro-Action Committee is a representative of its employees. Further the evidence fully supports Respondent's admissions. It is undisputed that the committee was composed of employees. It is clear, that it existed at least, in part for dealing with Allen concerning employee grievances with respect to discipline and other matters, which are terms and conditions of employment. As set forth above, at the August 10 meeting, Allen stated that the purpose of the committee was to bring employee complaints to him. Further, Kelly Germany's credible and undisputed testimony makes it clear that in fact the Pro-Action Committee did meet with Allen or his delegate on certain occasions in order to discuss specific employee grievances with him. Finally, it is clear that the purpose of the committee was to represent employees. Allen's testimony expressly describes the Pro-Action Committee as an employee representative body with the mission of conveying employee grievances to management.

The evidence also establishes the second prong of the *Electromation* test, which is the employer unlawfully dominated the committee. The credible testimony of McPhatter and other employees establishes that the idea of the committee was generated by Allen. Even assuming Allen is credited that the idea for the committee came from the floor at the August 10 "Total Staff Meeting," it is undisputed that Allen immediately seized upon, adopted, and took concrete steps to implement it by providing employees with the time and place to meet in order to establish the committee.

The evidence also establishes that while Respondent did not chose the members of the committee, it dominated the process of forming the committee. According to Germany's credible and undisputed testimony it was Respondent who later decided there would be three representatives from her department. Respondent Supervisor Gary Carswell ran the election for committee members from his department and it was Allen's "suggestion," which the employees understood as a requirement that the committee have a formal structure with at least a chairperson. Once the committee was formed, it was Allen who determined with whom they would meet, how they would conduct their investigations and what subjects would be taken up in meetings with him. The Respondent determined the manner in which the Pro-Action Committee would be structured is evident in the August 13 "Look N 2" minutes, in which Linda Landon set out these matters for the supervisory staff, without any apparent input from employees. Allen's testimony that he would only recognize a committee that conformed to his notion of what the committee should look like further highlights the point that it was Respondent that created the Pro-Action Committee to meet management's needs. Finally, the committee functioned entirely at Respondent's surfferance using its space and materials.

In establishing that a layoff, discharge or other adverse employment action by an employer violates Section 8(a)(1) and (3) of the Act, the General Counsel must prove that the alleged discriminatee engaged in activities protected under Section 7 of the Act, that the employer had knowledge of those activities, that the employer harbored animus toward its employees based upon their protected activities and that there was a motivational link between the animus and the discharge, layoff of other adverse employment action. Once these elements of a prima facie have been established, the employer has the burden to come forward with evidence that its conduct was not motivated by the protected activities or that it would have taken the complained of action even in the absence of the protected activity. *Wright Line,* 251 NLRB 1083 (1980), enfd, 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *Transportation Management Corp.*, 462 U.S. 393 (1983). The employer's motive may be established by either direct evidence or may inferred from the circumstances, including the timing of the employer's conduct, and the lack of a plausible alternative explanation. *Intersweet, Inc.*, 321 NLRB 1 (1996) (Unlawful motive inferred from circumstances including fact that employer had never responded to drop in business with layoffs before.); *Electronic Data Systems,* 305 NLRB 219 (1991), modified on other grounds 985 F.2d 801 (5th Cir. 1993).

The employees' union activities as well as Respondent's knowledge of those activities, as early as the first week in August, are clear and undisputed. Further, as set forth above, Respondent's intense animus toward its employees for attempting to organize is clear. The tape recording of the August 10 meeting, the "Look N 2" minutes of August 6 and Allen's ruminations into his dictaphone, reveal without doubt, Allen's intense animus toward the Union and his resentment of his employees' organizing efforts. Further, the 8(a)(1) violations as well as the establishment of a rival, employer-dominated labor organization, suggest that Respondent, and Allen in particular, harbored strong animus toward the Union and was willing to go to great lengths to nip the union campaign in the bud.

I conclude that the transfer of Darlene McPhatter violated Section 8(a)(3) and (1) of the Act.

As set forth above, Respondent's incessant questioning of McPhatter about her union activities constituted unlawful interrogation in violation of Section 8(a)(1) of the Act. Respondent compounded its unlawful conduct by punishing McPhatter with a transfer to another department at a lower rate of pay because it was dissatisfied with her responses to its unlawful questions. See *Cannondale Corp.*, 310 NLRB 845, 850–851 (1993). That McPhatter was ultimately saved from the pay cut by the Union's intervention and Respondent's fear of legal action does not alleviate the coercive impact of Respondent's conduct, nor

does it reduce the tendency of Respondent's conduct to discourage union membership among its employees.

Further Respondent's contention that McPhatter was transferred for lying rather than for her union activity is without merit. It is clear in the record and Williams and Allen admit that the lie for which McPhatter was allegedly transferred was her refusal to be forthright about her union activity. Her responses to the unlawful questions about her protected activities, however, are themselves protected. To find otherwise would completely undermine the protections afforded by Section 7. Any employer could simply engage in illegal questioning and then discharge or transfer employees on the pretext that they lied in their answers.

I conclude that Allen's refusal to borrow money to fund payroll checks for its employees was violative of Section 8(a)(1) and (3).

The evidence strongly supports a finding that the September 4 payroll was missed because Respondent, by Allen refused to borrow in order to meet payroll, the action it ordinarily would have taken, but for its employees' attempts to organize. Respondent admits that its financial problems had been ongoing for a period of months, if not years. Further, as set forth above, the evidence establishes that up until the summer of 1998, Respondent regularly accessed its line of credit at Chase Manhattan Bank to cover its payroll by borrowing against its line of credit. As a result of Respondent's common, if not routine practice of borrowing, it had avoided missing payroll, despite its severe financial problems, until September 1998, when it was threatened by an organizing campaign.

The conclusion that the refusal to take loans was directly tied to its employees, union activity is not based upon timing alone. Allen, admitted at the August 10th "Total Staff Meeting" that he would not put his personal assets at risk as he had in the past, for people who would bring in the Union. Further, Allen's testimony that it "suddenly dawned on him" that he might be held personally liable for Respondent's loans and that this was his motivation for refusing to borrow, is on its face lacking in credibility, particularly in light of the fact that the event which Allen says triggered his concern, a manager of a similar program losing his home, occurred some 20 to 30 years before. In these circumstances, I conclude that but for the employees' union activity, Allen would have borrowed the funds necessary to meet payroll. Nor did Bryant and Allen take other steps to avert the missed payroll, by for example, borrowing from Gabriel House or other related organizations, an action Bryant admitted Respondent had taken in the past to cover its expenses by inexplicably did not do in these circumstances.

All of this evidence compels the conclusion that the decision to stop borrowing was based on Respondent's desire to demonstrate to employees that their livelihood depended on Allen's good will, which would be lost if they organized. Allen made sure his employees did not miss this point by spelling it out for them at the August 10, "Total Staff Meeting."

Respondent contends that inasmuch as it is not legally obligated to borrow in order to meet expenses, it was free to discontinue that practice for any reasons. However, it is well established that an employer may not change the wages, hours, and terms and conditions of employment where its motive is discriminatory and designed to encourage or discourage union membership. Withholding a paycheck indefinitely in order to impress upon employees the perils of union activity would clearly fall within this category See, e.g., *International Paper Co.*, 313 NLRB 280, 291 (1993) (Where an employer changed its practice by requiring employees to wait for their paychecks until the end of the day because of their union activity, the administrative law judge with Board approval found a violation.). Therefore while Allen was free to borrow or not borrow as a way of managing the Respondent's finances, what he was not free to do was suspend his regular practice of borrowing to meet payroll, for the express purpose of deomonstrating to employees the adverse consequences of their organizing efforts.

I conclude that employee James Sturkey was constructively discharged in violation of Section 8(a)(1) and (3) of the Act.

As set forth above, Sturkey's resignation was directly caused by Respondent's unlawful refusal to take the steps necessary to meet payroll; accordingly, it amounted to a constructive discharge. The finding of a constructive discharge is predicated on a two-prong test: (1) Where the employer has deliberately made working conditions unbearable with the intent to force the employee to resign and (2) Where the burdens were imposed because of the employees' protected activity. *Security USA*, 328 NLRB 374 (1999); *Control Services*, 303 NLRB 481, 493 (1991), enfd. 961 F.2d 1568 (3d Cir. 1992).

The indefinite withholding of an employee's paycheck is the kind and grievous burden imposed by an employer, which would support a finding of constructive discharge. *Trumbell Industries*, 314 NLRB 360, 365 (1994); *La Favorita, Inc.* 306 NLRB 203, 205 (1992). See also *Consec Security*, 325 NLRB 453 1998).

In this case, as set forth above, at the August 27 meeting Respondent would not say when it would resume issuing paychecks, nor was Sturkey able to obtain this information when he contacted the payroll department. Therefore Sturkey was not merely faced with missing one paycheck, but the prospect of working indefinitely without pay. A complete loss of pay for an indefinite period, is a much more pressing burden than other circumstances that the Board has found justified a constructive discharge finding. *Control Services*, supra at 493–494 (reducing, but not eliminating employees' pay and elimination of health insurance amounted to constructive discharge).

I conclude that the September 2, 1998 layoffs were violations of Section 8(a)(1) and (3).

Respondent's expressed animus toward its employees for engaging in union activities as well as the timing of the layoffs, during Union's organizing campaign, in and of themselves establish an unlawful motive. Although Respondent has been experiencing severe financial problems for many months, even years, it did not engage in any general layoffs until just about a month after it became aware of its employees' union activities. Moreover, the layoffs were timed to coincide with the missed payroll, which was also unprecedented despite the long-term fiscal difficulties. Although the evidence does not establish that Respondent specifically targeted the layoffs to flush out union supporters, the evidence compels the conclusion that Respondent implemented the layoff at this time to send a message to the entire bargaining unit that support for the Union would cost people their jobs and the Respondent would no longer protect its staff from the effects of its financial problems, as it did in the past, because of their interest in the Union.

Respondent contends that the layoff was economically motivated as the result of several years of increasing economic difficulties. Respondent further contends that it was a mere coincidence that the layoffs coincided with its knowledge of union

activities and its response to such activities which included the 8(a)(1), (2), and (3) activity described above.

What cannot be disputed is that these problems have persisted since at least early 1997. The only thing that changed for Respondent in the summer of 1998, was that Respondent's employees attempted to organize a union. It was not until this point that Respondent effected the layoffs. There is no explanation even offered as to why Respondent did not respond to its deficit earlier. In fact, the evidence suggests that until the Union reared its head Respondent conducted business as usual, despite a burgeoning deficit and recurring cash-flow problems. As set forth above, Respondent hired four employees in June and July, including Steven Gines and Kenneth Jackson, who then were let go 2 months later. That Respondent hired people at a time of financial problems and then abruptly laid them off soon after learning about the organizing campaign supports the conclusion that the Union, rather than Respondent's finances motivated the layoffs. The financial problems existed when Gines and Jackson were hired and when they were laid off, the union activity among Respondent's employees was the only thing that changed.

Nor does the record reflect other ameliorative efforts by Respondent to accommodate the deficit. While Williams made much of the fact that Respondent combined departments, his testimony revealed no cost savings from the alleged structural change other than the layoffs that are at issue here. In fact, there is no evidence at all that Respondent felt any sense of urgency about its finances until the emergence of the organizing campaign. Respondent did not even inform OASAS of its alleged crisis, until after Almanzar learned about it through her uninvited attendance at the August 27 "Total Staff Meeting." The fact that Respondent did not demonstrably respond to its crisis until it learned of the organization campaign and then took drastic action is powerful evidence of an unlawful motive.

The reasons proffered by Respondent to explain the timing of the layoffs do not hold up and accordingly raise an inference that its true motive was unlawful. The change in OASAS' bookkeeping practices, cited by Respondent, as a key reason it had to cut staff, was implemented for the 1997–1998 budget which was due, 7 months before the layoffs. Further, while Bryant made much of his inability to account for estimated savings on the CBR, Lite-Rottman pointed out that Respondent could have continued to account for estimated savings by submitting a PBCR. Lite-Rottman also characterized the estimated savings as a reporting device, which did not change the actual amount of money Respondent had to work with at all.

Lite-Rottman, a neutral witness with no interest in this litigation and with knowledge of Respondent's financial condition, did not support Respondent's contention that its sudden urgency to remedy its fiscal problems, after months and years of neglect, was propelled by economic circumstances. To the contrary, Lite-Rottman, paints the picture of an organization that is brazen in its disregard for its budgetary and reporting responsibilities. In this regard, Lite-Rottman testified that Respondent has not submitted a budget on time in the last 2 years and its budgets have been repeatedly returned because of incompleteness and inaccuracy. Allen's own statements evidence his contempt for OASAS' requirement. For example his statement at the August 10, "Total Staff Meeting" that he had maintained unqualified people despite admonishment by OASAS as well as his and Bryant's testimony that they resisted layoffs despite directives by OASAS over the years to cut staff, suggest that Respondent's posture in dealing with OASAS was passive aggression, if not outright defiance. Given this record, the Employer's assertion that it laid off 14 people in order to submit an accurate budget in a timely fashion is laughable. Moreover, Lite-Rottman disputed the contention that Respondent's financial woes took a critical turn in the summer of 1998. Rather, she testified she was unaware of any circumstances that would have compelled the layoffs or the missed payroll for that matter, in first week of September. Nor does Lite-Rottman's testimony support Bryant and Allen's assertion that they had a realistic fear that Respondent's funding would be abruptly terminated if they failed to submit a timely, acceptable budget on September 4. In fact, the budget submitted on September 4 was not accepted by OASAS and there was no interruption in funding.

Other factors support the conclusion that the layoffs were unlawfully motivated. Respondent was manifestly dishonest about the reason for the layoffs, telling employees, that OASAS had not provided timely funding in the summer of 1998, an assertion which the record contradicts. Nor is Respondent's citation to other factors, such as declining revenues, late payments from OTM and OASAS and the loss of the HUD grant compelling. Most of the loss from the HUD grant was absorbed by the April layoff of the employees paid on that line.

Further, if the loss of the HUD had been a significant factor, one would have expected the layoffs to occur much sooner than September. Similarly, the declining revenues and late payments by OTM, while not disputed, does not explain, Respondent's motivation with respect to the layoffs. Like its other budgetary problems, Respondent's problems with OTM were longstanding and ongoing. There is no evidence regarding the OTM payments that would explain why the layoffs occurred in September 1998. The late OASAS payments mitigate against Respondent's economic defense. As set forth above, the record reflects that the money from prior contracts owed by OASAS to Respondent had dramatically declined between March and September 4. If anything, in this respect, Respondent's financial problems had been ameliorated in the summer of 1998.

Further, Respondent's contention that the layoffs were the result of economic necessity is contradicted by its subsequent actions. Although substantial deficits remained, the layoffs were not followed by a period of austerity. To the contrary, within 2 months of the layoff, Cynthia Grant and Kyra Skinner were both rehired, Grant, at twice the salary she had been earning prior to her layoff. Joseph Lee was also rehired in October and Gines was rehired sometime after the layoffs. A new employee Bernard Arthur was rehired in October. Respondent offered no evidence, other than self-serving assertions that these hires were necessary and filled essential vacancies. In these circumstances, I conclude that once the layoff had served the intended purpose of squelching the organizing campaign, Respondent felt free to call certain employees back to work.

I conclude Respondent's failure to recall Flowers and Grant was violative of Section 8(a)(1) and (3).

Although at least four of the laid-off employees were subsequently rehired by Respondent, neither Trina Grant nor Judith Flowers, the two individuals whom Respondent knew were union supporters, were among this group. Further, Cynthia Grant, a former clerk, was rehired although her seniority, was considerably less than both Trina Grant's and, Judith Flowers. Moreover, Respondent did not explain the reason Cynthia Grant was rehired, while two more senior clericals remained on

layoff. However, the evidence does establish that Respondent was well aware of Cynthia's antiunion attitude. Further, Respondent failed to explain why it returned clerk-typist Steven Gines to work although he had just been hired in July. In short, Respondent's witnesses testified that they used seniority as a basis for recall but then blatantly bypassed the more senior people, without any explanation. I conclude the explanation was that Respondent sought to avoid hiring known union supporters.

REMEDY

Having found Respondent has engaged in certain unfair labor practices, I find that Respondent must be ordered to cease and desist, and to take certain affirmative action designed to effectuate the policies of the Act.

With respect to the unlawful domination by Respondent of the Pro-Action Committee, I shall recommend an order requiring Respondent to immediately disestablish and cease giving any assistance or any other support to the Pro-Action Committee.

With respect to Respondent's failure to timely provide employees with the September 4 payroll, I shall recommend that Respondent provide employees with interest to the extent that payments were late, in accord with the formula adopted by the Board in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, employees should be made whole for any losses they sustained by reason of the late payroll.

I shall also recommend that Respondent offer reinstatement to James Sturkey, and the 14 laid-off employees to the positions from which they were discharged or laid off or to substantially equivalent positions, without prejudice to their seniority or any rights and privileges previously enjoyed, make them whole for losses caused by their constructive discharge or layoff respectively with interest as set forth above and remove from their records any reference to the layoff. I also shall recommend that Darlene McPhatter be made whole for any losses she sustained as a result of her unlawful transfer, with interest as set forth above.

ORDER

The Respondent, Addicts Rehabilitation Center Fund, Inc., New York, New York, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Interrogating its employees about their union activities, on behalf of District Council 37, AFSCME, AFL–CIO (the Union).

(b) Soliciting grievances from its employees as a means of thwarting an organizing campaign.

(c) Threatening its employees with unspecified reprisals because of their support for and activities on behalf of the Union or any other labor organization.

(d) Threatening its employees with disciplinary action because of their support for activities on behalf of the Union, or any other labor organization.

(e) Threatening its employees with transfer to another department because of their activities on behalf of and support for the Union or any other labor organization.

(f) Threatening its employees with loss of employment if they attempted to organize for this Union or any other labor organization, or select the Union as their collective-bargaining representative.

(g) Threatening its employees with loss of pay because they attempt to organize for the Union or any other labor organization.

(h) Creating and maintaining an employer dominated labor organization and/or by providing unlawful assistance to that labor organization.

(i) Transferring its employees to other departments because of their activities in support of the union, or any other labor organization.

(j) Failing to provide its employees with their scheduled paychecks because of their activities in support of the Union, or any other labor organization.

(k) Constructively discharging employees because of their activities in support of the Union, or any other labor organization.

(l) Laying off its employees because they engaged in activities in support of the Union, or any other labor organization.

(m) Failing to recall its employees because of their activities in support of the Union or any other labor organization.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, disestablish and cease giving any assistance or support to the Pro-Action Committee.

(b) Pay to its employees on the September 4, 1998 payroll, interest to the extent that their payroll checks were late, as set forth in the remedy section of this decision.

(c) Make whole employees for any losses sustained by as a result of the late payroll checks.

(d) Within 14 days of this Order offer to:

James Sturkey	Alexis Ferrel
Geraldine Carthens	Kyra Skinner
Judith Flowers	Trina Grant
Katrina Wright	Beverly Ballard
Steven Gines	Kenneth Jackson
Cynthia Grant	Joseph Lee
Michael Sanders	Beverly Harris
Roberta Thompson	

full reinstatement to their former jobs, or if such jobs no longer exists to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) I make whole Darlene McPhatter for any losses she sustained as a result of her unlawful transfer.

(f) If within 14 days of this Order remove any record of the employees laid off on September 2, 1998.

(g) Within 14 days after service by the Region, post at its New York, New York facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify them that we have removed from our files any reference to their discharge and that the discharge will not be used against them in any way.